No. 12947

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA VEGETABLE GROWERS, a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

ERNEST A. TOLIN,
United States Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division,

ROBERT K. GREAN,
Assistant U. S. Attorney,

312 North Spring Street,
Los Angeles 12, California,
Attorneys for Appellee.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

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Jurisdiction.

This is a suit of civil nature brought against the United States of America, and jurisdiction of the Court was invoked under the provisions of Title 28, Section 1346(a)(2), U. S. C. [Tr. p. 38.]

Statement of Facts.

The facts are not in dispute. A Stipulation of Facts appears in the Transcript of Record on page 14, and the statement as set forth in Appellant's Opening Brief is accepted with the following exceptions and additions:

a. The purchase was "F.O.B. origin, subject to inspection and acceptance at destination." [Tr. p. 14, III; Exs. G, H and I, Tr. p. 51.]

b. The temperature of the celery when inspected at destination, Seattle, Washington, were ideal temperatures for storage or transportation of celery. [Tr. pp. 26, 28, 30, 143 and 145.]

Question Presented on Appeal.

Where a buyer purchases a perishable commodity F.O.B. origin, but subject to inspection and acceptance at destination, and the commodity has deteriorated below the standards permissible without the fault of the buyer during transit, may the buyer reject the commodity in accordance with the terms of the contract?

ARGUMENT.

A. Title Did Not Pass at Point of Origin.

The inspection provisions of the contracts [Tr. pp. 31, 32 and 33] provide on the face thereof "inspection and *acceptance* at destination." (Emphasis added.)

Further inspection provisions [Tr. p. 35] provide:

> "1. INSPECTION—(a) Subject to the terms of Condition 4 of this contract and reserving to the Government all rights therein, it is contemplated that the supplies ordered herein shall be inspected as follows:
>
> (1) Inspection at origin shall be made for compliance with all applicable terms of the contract, including without being limited to inspection for type, grade and condition. In such case, inspection at destination shall be limited to condition and quantity."

Since, in accordance with the contract, a Federal-State inspection was had at origin, inspection at Seattle was limited to condition and quantity.

This language is not difficult of interpretation, and the condition referred to in limiting the inspection at destination is obviously the condition of the produce at the time of inspection at destination.

Appellant attempts to explain away the express provisions of the contracts requiring inspection for condition at destination by urging that although physical inspection is to be made at destination, it would relate to the condition of the produce at the point of origin. This line of reasoning would have the appellee specifically providing for two inspections of the condition of the produce, at two different places, for the purpose of determining what the condition was at the point of origin. This could hardly be considered a reasonable interpretation of the language of the contracts. Hence, there is no room for appellant's contention that the inspection at destination must relate to condition at the time of origin of shipment.

Such a contention may perhaps be true where title has passed at point of origin and any inspection thereafter would of necessity relate to the condition at the time the buyer took title. The instant case, however, is not such a case.

Williston, at page 101, Volume II, in his revised work on Sales, Section 280(b), states the law as follows:

> "As the rule that the property passes as soon as the goods are delivered at the point where they are free on board is merely *one of presumption,* it will yield to other terms of the contract indicating a contrary intention. Especially it is not uncommon to

impose a duty on the seller to deliver goods at their ulitmate destination for a price f.o.b. at point of shipment, that is, the buyer as part of the price bears all the expense on the goods after the place of shipment or other named f.o.b. point, but otherwise the contract remains one for delivery of the goods at the further point." (Emphasis added.)

See, in this connection, *Johnson v. Banta,* 87 Cal. App. 2d 907, 910 (1948), holding that f.o.b. is used in the contract in connection with the price only and not as fixing the place at which title passed.

While the appellee does not contend that this is a case arising under the Perishable Agricultural Commodities Act, the language of said Act provides an acutely analogous situation pertaining to the interpretation of contracts such as these with a "seller" of produce such as the appellant making sales in interstate commerce.

Under the heading *Trade Terms and Definitions,* the following language is set out in Title 7, Code of Federal Regulations, Section 46.30(cc), at page 226 of the First Edition:

"The term 'f.o.b. inspection and acceptance arrival' shall be deemed to mean that the commodity quoted or sold is to be placed by the seller free on board car or other agency of through transportation at shipping point, the cost of transportation to be borne by the buyer, but the seller to assume all risks of loss and damage in transit not caused by the buyer who has the right to inspect the goods upon arrival and

to reject them if upon such inspection they are found not to meet the specifications of the contract of sale at destination. The buyer may not reject without reasonable cause. Such a sale is f.o.b. only as to price and is on a delivered basis as to quality and condition."

Attention is called to the remarkable parallel between the language of Williston on Sales quoted above and the language of the Perishable Agricultural Commodities Act here stated. Both say, in effect, that such a sale is f.o.b. only as to price, but is on a delivered basis as to quality and condition.

Obviously, then, appellant is laboring under the misapprehension that title passed at the f.o.b. point, and his citation of cases on page 7 of his Opening Brief are all in support of such a situation and, hence, not applicable to the contracts before the Court in which a contrary intention appears. The very language quoted above under the Perishable Agricultural Commodities Act, under which the appellant is a "seller" in interstate commerce, is evidence of the proper interpretation of the contractual intent of the parties.

Appellant's quotation from Williston, Volume III, cited on page 8 of Appellant's Opening Brief, is from Section 473 of said Volume under the heading "*Right of Inspection as a Condition Precedent to Paying the Price* AFTER THE PROPERTY HAS PASSED" (emphasis added) and is not applicable here.

The applicable section, however, Section 472 of Williston, Volume III, states, at page 5, under the heading *"Right of Inspection as a Condition Precedent to Transfer of the Property"*:

> "* * * He [the buyer] is entitled to examine the goods in order to decide whether he will become owner and until the examination is completed or waived he is under no obligation to accept the goods."

And, at page 7, Williston goes on under the same heading with:

> "Not only opportunity to inspect *but acceptance* is a condition precedent to the transfer of ownership * * *." (Emphasis added.)

Appellant attaches importance to the provision of the purchase order requiring the commercial bill of lading to be converted to Government bill of lading at destination. While it is true that this provision was placed in the order to enable the Government to take advantage of the reduced freight rates on land-grant railroads, as it is bound by law to do (10 C. F. R., 81.10), this arrangement would naturally follow a contract requiring the Government to pay the freight rates from the point of origin. This, however, would not affect the question of the ownership of the property at the time of transportation for the purposes of risk of loss in transit, and such is the specific holding of the cases cited by the appellant in his brief at the bottom of page 12. These cases are those in which the contract provisions specifically called

for delivery f.o.b. destination. Hence, *Cross v. United States,* 133 F. 2d 183, states at page 186:

> "Plaintiff, not without merit, relies strongly upon the circumstances that shipments made on Government bills of lading disclose an intention on the part of the Government to accept delivery at Robinson [point of origin]. *Such an arrangement, however, is not conclusive as to the ownership of property during transportation.*" (Emphasis added.)

The case of *Louisville and N. R. Co. v. United States,* 267 U. S. 395, is there cited by the Court in support of said proposition, and that case states, at page 398:

> "But the mere use of Government forms of bills of lading is not conclusive on the question of ownership of property at the time of transportation. * * *"

It could also be reasoned that the instruction to ship on commercial bill of lading was for the specific purpose of conforming to the intention of the parties that title not pass until actual acceptance by the Government at destination who could *then* convert the commercial bills to Government bills, since the Government agreed to pay for transportation from the point of origin.

It is significant to note in the Findings of Fact [Tr. pp. 38, 39 and 40] that the Court failed to find that title passed to appellee at the time delivery was made f.o.b. cars at point of origin.

In fact, the Court spent little time on passage of title, going directly to the right of the Government to reject or accept after inspection at destination. [Tr. p. 158.]

B. Even Assuming for the Sake of Argument That Title Had Passed at Point of Origin, the Appellee Could Still Reject Acceptance of the Commodity.

The appellant states in his brief, at page 4, "Neither party could account for the deterioration and neither party had any information relating to what happened to the celery during the seven to nine day shipment period." This statement is not true. And although the Findings of the Court go only to the fact that the celery was found to be decayed beyond the tolerances permitted by "U. S. Standards for Celery" and not fit for export [Tr. p. 40], and concluded therefrom that as a matter of law "the plaintiff failed in the due performance of said contracts," the destination inspection certificates [Tr. pp. 26, 28 and 30] show "Bacterial Soft Rot" and "Watery Soft Rot," while the uncontradicted testimony of appellee's expert witness [Tr. pp. 148 and 149] and the corroborating testimony of the appellant's witness [Tr. p. 97] show said infection of the celery to have been a field disease not discernible to the naked eye. If we assume for the sake of argument that title passed at point of origin, the foregoing set of facts brings the case squarely within the case of *Conroy v. Weyl-Zukerman & Co.,* 39 Fed. Supp. 784, which holds:

> "Where under the terms of a contract for sale of carload of carrots title and risk passed to buyer when carrots were shipped, buyer must bear the loss due to decay of carrots in transit, if such decay resulted from improper refrigeration, *but if decay was result of latent defect which became manifest only in the course of shipment, then loss must fall upon seller.*" (Emphasis added.)

In the *Conroy* case, *supra,* the destination inspector, after an examination of the decay, concluded that it was caused by watery soft rot. The Court states, at page 787:

> "The fact that the defect in the commodity is not discernible at the point of shipment does not alter liability, which falls on the shipper by reason of an implied warranty which is attached to the goods. California Civil Code, Section 1735(1), and cases. The P. A. C. A. [Perishable Agricultural Commodities Act] does not remove the applicability of the law of sales; it merely gives an additional remedy to growers, who were previously forced to resort to expensive trials in all cases in which dealers and commission men failed to live up to the provisions of their contracts. Where goods, such as carrots in the case before this court, suffer from a latent defect which takes time to appear, and hence do not meet the implied warranty of quality which is attached to the contract, the shipper is responsible under Section 2 of the P. A. C. A." (7 U. S. C. A., 499(b), par. 2.)

The above case cites many authorities in support of its position. To the same effect is the case of *Jos. Martinelli & Co. v. L. Gillarde Co.,* 73 Fed. Supp. 293. Vacated 168 F. 2d 276, amended 169 F. 2d 60, certiorari denied 69 S. Ct. 237, 335 U. S. 885, 93 L. Ed. 424. This case holds:

> "Where cantaloups, sold as 'U. S. No. 1' grade melons, were inherently defective because of infection with Cladosporium Rot, a disease of field origin, melons did not meet the implied warranties of description and quality, and buyer, under Uniform Sales Act, was justified in rejecting them."

The Court states, on page 295:

> "Cladosporium Rot was described by appellant's expert witness as a disease of field origin which is not apparent to the naked eye when melons are in green ripe or hard ripe stage, but which develops as the melons ripen, causing them to decay. The witness further testified that melons infected with the disease were not, in fact, U. S. No. 1 grade, even though an inspector of the United States Department of Agriculture, who did not discover its presence, so graded them. * * * no testimony adduced at the trial, contradicted this statement."

To the same effect is the case of *California Fruit Exchange v. Henry,* 89 Fed. Supp. 580, affirmed 184 F. 2d 517, holding:

> "Where food products do not meet the contract requirements shipper must bear loss resulting from deterioration in transit, and fact that defect in commodity is not discernible at point of shipment does not alter shipper's liability arising from implied warranty."

A further provision of the Perishable Agricultural Commodities Act under Section 46.30(j), construing trade terms and definitions, at page 222, defines "suitable shipping condition" as follows:

> " 'Suitable shipping condition' in relation to direct shipments shall be deemed to mean that the commodity, at time of billing, shall be in a condition which, when shipment is handled under normal transportation service and conditions, will assure delivery without abnormal deterioration at the destination specified in contract of sale."

It would appear, then, that according to the cases cited, even if title were considered to have passed to the buyer at the point of origin, the celery could have been rejected at point of destination by reason of a latent defect therein, to wit, the bacterial soft rot, a field disease, which rendered the celery spoiled when delivered, so that it did not then meet the implied warranty of quality or fitness for export attached to the contract of sale.

Summary.

1. The contracts provided for a sale f.o.b. only as to price and on a delivered basis as to condition.

2. Acceptance was a condition precedent to the transfer of ownership, and the trial court found that according to the terms of the contracts the Government had the right to accept or reject.

3. The celery contained a latent defect and, hence, did not meet the implied warranties of quality.

4. The Government was justified in rejecting the shipments.

Conclusion.

The trial court properly found in favor of the appellee, who therefore respectfully urges that the judgment of the trial court be affirmed.

Respectfully submitted,

ERNEST A. TOLIN,
United States Attorney,

CLYDE C. DOWNING,
Assistant U. S. Attorney,
Chief, Civil Division,

ROBERT K. GREAN,
Assistant U. S. Attorney,

Attorneys for Appellee.